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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

JACKSON COUNTY BY AND THROUGH
ITS CHILD SUPPORT ENFORCEMENT
AGENCY Ex rel. ANNETTE JACKSON,

Petitioner,

v.

JOHN WESLEY SWAYNEY,

Respondent.

On Petition For A Writ Of Certiorari
To The North Carolina Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state court has jurisdiction over a paternity action where the putative father, the mother, and the child are enrolled members of the Eastern Band of Cherokee Indians and reside on the Tribe's reservation, and where the Tribe asserts jurisdiction over such actions pursuant to a comprehensive Tribal Code.

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STATEMENT OF THE CASE

Respondent John Wesley Swayney is a citizen of the United States and an enrolled member of the Eastern Band of Cherokee Indians. Respondent resides on the Reservation which is within the State of North Carolina. The Reservation is located in portions of Swain, Jackson, Graham, Cherokee and Haywood Counties.

On April 12, 1982, Petitioner Jackson County Child Support Enforcement Agency filed a paternity action in state court to have respondent declared the father of Kevin Jackson, and to collect a debt owed to the state for public assistance, Aid to Families with Dependent Children (AFDC), paid for Kevin Jackson's benefit. Annette Jackson, mother of Kevin Jackson, and Kevin are enrolled members of the Eastern Band of Cherokee Indians residing on the

Reservation. Annette Jackson applied for and received benefits from the Jackson County Department of Social Services which is located on the Reservation.

The Cherokee tribal court system was created by the Cherokee Tribe in July 1980 pursuant to Tribal Resolution. The Tribe has enacted an ordinance providing for tribal court jurisdiction over actions to establish paternity and child support (§ 110-17; § 110-3 - § 110-5, The Cherokee Code). Since 1982, Swain, Graham, Cherokee and Haywood Counties have filed 87 cases in the Cherokee Tribal Court. Currently there are 53 cases pending in the Tribal Court. The Tribal Court collects child support from Indian fathers and forwards it to the North Carolina Department of Social Services. No paternity or child support cases have been filed in the Cherokee

Tribal Court by the Jackson County Child Support Enforcement Office.

On July 16, 1984, the district court granted respondent's motion to dismiss based on lack of subject matter jurisdiction and lack of personal jurisdiction. Petitioner appealed to the Court of Appeals which affirmed the lower court's finding of lack of subject matter jurisdiction on the ground that federal law preempted state court jurisdiction over the matter. Additionally, the Court of Appeals reversed the finding of lack of personal jurisdiction.

Petitioner appealed to the North Carolina Supreme Court. The Supreme Court first found that the exercise of state court jurisdiction over actions to collect debts owed to the state for public assistance and to obtain a judgment for future child support did not infringe on

tribal self-government, even under the facts of this action. Respondent by separate petition seeks a writ of certiorari as to this portion of the North Carolina Supreme Court decision. However, the Supreme Court held that the exercise of state court jurisdiction over paternity actions unduly infringes on tribal self-government. The Court remanded the case to the Court of Appeals. If paternity is contested, the district court ordered proceedings stayed pending disposition in the Cherokee Tribal Court. Petitioner seeks review of the North Carolina Supreme Court decision, upholding tribal jurisdiction over the paternity action.

I. THE STATE COURT DECISIONS OF NEW MEXICO, NORTH DAKOTA AND NORTH CAROLINA ARE NOT IN CONFLICT WITH THE NORTH CAROLINA DECISION

Petitioner argues that the decision below is in conflict with the results of

two other state Supreme Court cases: State ex rel. Department of Human Services v. Jojola, 99 N.M. 500, 660 P.2d 590 (1983), cert. denied, 464 U.S. 803 (1984); McKenzie County Social Services Board, S.N.F., through Michon Sax as Guardian Ad Litem and C.F.V.V.G., 392 N.W.2d 399 (N.D. 1986), cert. denied, 55 U.S.L.W. 3643 (March 24, 1987) (No. 86-996). In Jojola, the New Mexico Department of Human Services instituted a paternity action and collection of a child support debt against Jimmy Jojola. Mr. Jojola, the mother and child were all residents and members of the Isleta Pueblo. The New Mexico Supreme Court held that the exercise of state court jurisdiction over the paternity action did not infringe on tribal self-government. The Court reasoned that the mother assigned her right to child support to the Department of Human Services, and thus the

action could be characterized as a non-Indian versus Indian action. Also, the court found the cause of action arose outside the reservation because the mother applied for public assistance off the reservation. The Court, however, did not discuss the tribal interests at stake.

Jojola petitioned for certiorari to this Court. Jojola v. State ex rel. Department of Human Services, (June 1983) (No. 82-2049). During the appeal, the State of New Mexico filed a Motion to Dismiss because events subsequent to the New Mexico Supreme Court decision rendered the case moot. The State of New Mexico argued that the State had issued a policy statement which directed, "that in all such cases, in which the mother, putative father, and child are Indians who reside on the reservation, the paternity action shall be filed in the Tribal Court of competent

jurisdiction. . . . The Department codified its policy decision to defer to Indian tribal sovereignty in paternity determinations such as presented here." Motion of Appellee To Dismiss at 4,5, Jojola v. State ex. rel., Department of Human Services, (June 1983) (No. 82-2049). The State dismissed its action in state court on the grounds that the paternity issue would be pursued in the Tribal Court of Isleta. Thus, while the New Mexico Supreme Court decision is not technically moot, the State has deferred to tribal court jurisdiction. Therefore, there is no conflict with the North Carolina Supreme Court decision upholding tribal court jurisdiction over paternity actions.

McKenzie County, 392 N.W. 2d 399, involved members of the Three Affiliated Tribes of the Fort Berthold Reservation. The mother obtained benefits from the North

Dakota Department of Social Services for her child and alleged the father of her child was V.G. The McKenzie County Board of Social Services filed suit in state court to establish paternity and to collect child support paid to the mother. The North Dakota Supreme court held that state court jurisdiction would infringe on tribal self-government citing Williams v. Lee, 358 U.S. 217 (1959). This decision comports with the North Carolina decision.

In this case, the North Carolina Supreme Court found that state court jurisdiction over a paternity matter infringed on the right of the Cherokee Tribe to make laws and be governed by them. The Supreme Court reviewed the Jojola case and rejected the New Mexico's Supreme Court's determination that because the cause of action arose off the reservation then the state courts should

have jurisdiction. Instead, the Court ruled that the basis of suit is a determination of parentage, not the location where benefits were obtained. Accordingly, this is purely an internal tribal matter which is within the exclusive jurisdiction of the Tribe.

This case and McKenzie County affirm the long-standing principle that Indian tribes have jurisdiction over civil matters within their boundaries. Like this case and McKenzie County, the State of New Mexico has deferred to tribal court jurisdiction in paternity matter. Therefore, there is no conflict in the State courts over which court (tribal or state) has jurisdiction over paternity matters. All the results uphold tribal self-government.

II. THE DECISION BELOW GIVES EFFECT TO WELL-ESTABLISHED PRINCIPLES OF TRIBAL SELF-GOVERNMENT

A. A Paternity Action Is An Internal Matter Governed By Tribal Law

The court below correctly found that a paternity action is an internal domestic matter of great significance to the Cherokee Tribe. One cannot imagine an issue more basic to the self-government and determination of a separate people than the right to establish parentage and the family relationship. The determination of paternity is inclusive of membership in the Cherokee Tribe. As recognized by this Court, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence. . . . [T]he judiciary should not rush to create causes of action that would intrude on these delicate matters." Santa Clara Pueblo v. Martinez, 436 U.S.

49, 72 n. 32 (1978). Thus, allowing a paternity action to be filed in state court would abrogate tribal decisionmaking on membership, unsettle the Cherokee Tribe's ability to maintain authority of internal matters, and disrupt the whole of tribal government.

It is well settled that on such basic matters of membership tribal Indians have a right to make their own laws and be governed by them. Williams v. Lee, 358 U.S. 217, 223 (1959); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). This Court has continued to stress that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980), quoting United States v. Mazurie, 419 U.S. 544, 557 (1975). Indeed, this Court has maintained that

tribal forums have exclusive jurisdiction over the domestic relations of their members, United States v. Quiver, 241 U.S. 602 (1916); Fisher v. District Court, 424 U.S. 382 (1976), which includes "the power of regulating their internal and social relations," United States v. Kagama, 118 U.S. 375, 381-82 (1886), cited in United States v. Wheeler, 435 U.S. 313, 322 (1978).

In Williams v. Lee, 358 U.S. 217, this Court forbade the exercise of state jurisdiction where it would undermine the authority of tribal courts over reservation affairs and hence would infringe upon the right of the Indians to govern themselves. That action involved a non-Indian trader, who sued an Indian in Arizona state court to collect for goods sold him on credit at a reservation trading post. This Court set forth the test for state court jurisdiction

over causes of action arising in Indian country with an Indian defendant as:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

358 U.S. at 220. The Williams test reinforces the fact that "[t]he policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945).

This Court applied the infringement test in an adoption proceeding, where all were members of the Northern Cheyenne Tribe residing on the Reservation and the dispute arose on the Reservation. Fisher v. District Court, 424 U.S. 382 (1976). In Fisher, this Court held that state court jurisdiction would interfere with tribal self-government, and stated,

> State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. [footnote omitted]. As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court.

424 U.S. at 387-388.

B. <u>The Social Security Act Does Not Confer Jurisdiction To The North Carolina State Courts</u>

The petitioner argues that this case should be reviewed because there are a number of federal entitlement programs which mandate the states to pursue certain legal actions in state courts and are silent as to the jurisdiction of these courts over matters arising on Indian

reservations. The only act in question in this case is the Social Security Act which requires the State to comply with the federal requirements for the AFDC programs. King v. Smith, 392 U.S. 309 (1968). The court below made no broad findings which would impact other federal programs administered by states. The court correctly found that under 45 C.F.R. §303.5 the state could resort to the Tribal Court. The decision does not qualify for review by this Court.

Furthermore, the congressional intent to authorize the intrusion of state courts upon the jurisdiction of tribal courts must be clear and plain. The Social Security Act, a general federal statute, does not meet the standard enunciated by this Court. United States v. Dion, 476 U.S. ___, 90 L.Ed.2d 767, 773 (1986).

CONCLUSION

The petition for Writ of Certiorari should be denied.

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